Filed 5/16/19 P. v. Peterson CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON ROBERT PETERSON, Defendant and Appellant.	A151953 (San Mateo County Super. Ct. No. 16NF002665A)
In re JASON ROBERT PETERSON, on Habeas Corpus.	A154083 ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

BY THE COURT:

It is ordered that the opinion filed on May 2, 2019, be modified as follows:

On page 23, the last sentence in the first full paragraph is modified to read: Whether in a halfway house or in federal prison, Peterson was "in custody" within the meaning of section 2900.5, and the but for causes of that custody were Peterson's federal charges and sentence.

There is no change in the judgment. The petition for rehearing is denied.

Dated: _____ _____ Acting P.J.

Filed 5/2/19 P. v. Peterson CA1/2 (unmodified opinion)

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Defendant Jason Peterson and Regina G. began a romantic relationship in 2008. That December, Peterson began serving a ten-year federal prison sentence. At the end of 2010, Regina ended the relationship, but over the following years Peterson continued to telephone her and to send her letters and text messages, indicating that he wanted to reconcile with her and threatening to harm or kill anyone else with whom she might be romantically involved. Regina eventually went to the police, and Peterson was convicted of one count of stalking (Pen. Code, § 646.9, subd. (a))[1]. Peterson appeals, arguing that the evidence was insufficient to support his stalking conviction, that his trial counsel was ineffective in various ways, and that the trial court erred in admitting certain of the

[1] All undesignated statutory references are to the Penal Code.

prosecution's expert evidence. He has also filed a petition for writ of habeas corpus (A154083) based on his ineffective assistance arguments. The Attorney General has filed a cross-appeal challenging the trial court's custody credit calculation. We will remand for a new custody credit calculation, but otherwise affirm the judgment on direct appeal. And we deny the habeas petition.

FACTUAL AND PROCEDURAL BACKGROUND

Peterson and Regina began dating in 2008. Regina testified that Peterson began verbally abusing her "pretty short into the relationship," and that this verbal abuse escalated to physical abuse after about three months. Peterson slapped, choked and held Regina down. On one occasion, he broke into her apartment, put her clothes in garbage bags, and threatened to burn them unless she came home. On another occasion, Regina was staying with her aunt who was ill. Angry that Regina was not spending time with him, Peterson drove around her aunt's house some 60 times, revving the engine. On yet another occasion, Peterson was upset that Regina was going out with her girlfriends for her birthday, and so he kept her in her apartment for two and a half days, during which time he physically abused her.

In December of 2008, Peterson began serving a ten-year federal prison sentence for possession with intent to distribute methamphetamine (21 U.S.C. § 841(a)(1)). Initially, Regina and Peterson agreed to stay together while he was in prison. Regina visited Peterson approximately five times, he wrote letters, and they spoke on the phone. During this time, Regina was scared of Peterson and "felt extremely controlled."

At the end of 2010, while visiting Peterson with his mother, Regina told him that he was abusive and she did not want to be in the relationship anymore. Regina told Peterson "you can still call me; we can be friends." She did so because she found Peterson "extremely scary" and knew that he had "contact with a lot of people on the streets that look up to him." In particular, Peterson was a member of the Hell's Angels motorcycle gang.

Six months later, Regina went to a Giants' game with a date, where she saw a group of Hell's Angels members. Shortly afterwards, Peterson called her and asked "who the hell were you with?"

Regina asked Peterson to stop contacting her around the time that she began a new romantic relationship. Nevertheless, Peterson continued to call her, send her letters, and contact her through mutual friends, telling them "you better tell her to answer [my calls] or there's going to be a problem." Indeed, if she ignored his calls, his friends would come to her house to tell her that she better answer the phone or "there's going to be a problem." Peterson's letters contained vague threats such as "[y]ou better clean the house before I get home, so there isn't a problem" and "[b]etter hope there's no guy around."

In August of 2014, Regina began saving Peterson's letters because she began to fear for her own safety. One such letter asked "do I got to have someone get at" the "sand nigger," which Regina understood to be a reference to an Arabic man she was dating. In another letter, Peterson appeared to indicate that he had sent two "tough guys" to threaten the "sand nigger" and "[f]uck everything he is or cares about." Regina testified regarding the letters in general that "every single letter pretty much means get rid of any guy you are dating because I'm going to come home and hurt him and you are going to be responsible."

On October 31, 2015, after ignoring several of Peterson's text messages, Regina wrote back: "Oh, Jason, you make my stomach cringe. I refuse to entertain you. I'm blocking this." Over the next several days, Peterson sent Regina hundreds of text messages, including one that stated: "If there is a dude in your head or dudes around, you need to tell them it's over. They need to fucking get that in their heads. Ain't a fucking thing in their family I care about, if they don't get this clearly. [¶] I'm telling you, I'm done being passive and understanding."

Regina then sent several text messages to Peterson, telling him that he was abusive and that she did not want any further contact with him. She also falsely told Peterson that she was dating a San Francisco police officer in the hope that this would cause him to

leave her alone. Peterson sent some 60 text messages within the next few hours, telling Regina that his "future is on death row. That's what they give you for killing a cop in California." And: "I will not at all in any way, shape, or form hesitate to destroy any dude in the way, even if it means going out with it." And in another: "If you think any dude is going to pop up and I won't drag him with my car, then you're confused. And if it's a cop, fireman, or a gardener, it don't matter, I will destroy him and me both. If a dude is around, you'll be fine, not a scratch on you. But when I said you need to understand what you created, that's what I mean. I'll kill a dude that's around and don't care who knows, because it's real and the cops will kill me." And: "Make sure he knows to be gone before I get home." A final message stated: "I'll be home in April; we'll see how it goes."

Around November, Regina went to the police with her collection of Peterson's letters and text messages.

Throughout November and December, Peterson continued to send Regina letters and text messages. After she ignored a message asking if he could call her around Thanksgiving, Peterson wrote: "Why do you ignore this communication? After all that's happened, you think now not answering is going to change anything. It's either going to prove you played a game the whole time, which ain't good, or it's just—it's gonna just make shit worse to the people that got involved. Me and you are far from done. Shit don't work the way you played it. You've ran me through a roller coaster and the ride is going to end soon." Regina felt "sick to [her] stomach, hopeless, helpless," and that Peterson would never let her go.

After Peterson called Regina five times on Christmas Eve, she blocked his phone number. He then sent numerous text messages on Christmas Eve and Christmas Day, one of which stated: "WHAT FUCKING PUNK, NIGGER, MOTHER FUCKER BLOCKED THE PHONE? DO YOU THINK THAT'S A GAME WE PLAY AT THE END OF MY BIT AND IT MATTERS? WHY WOULD YOU DO THAT ON XMAS WHEN ALL I WANTED IS—TO DO IS SAY HELLO? WHY, WHAT'S THE POINT? I'LL SEE YOU IN A COUPLE MONTHS. YOU CAN KILL ME THEN OR GET ME KILLED."

The messages continued, and on January 14, 2016, Regina blocked Peterson's text messages.

On March 14, the San Mateo County District Attorney filed a felony complaint charging Peterson with one count of stalking (§ 646.9, subd. (a)) and two counts of making criminal threats (§ 422, subd. (a)).

On August 1, Regina received a prepaid call from jail with Peterson's voice saying "I'm in Redwood City." Peterson made a total of six calls to Regina on August 1, none of which she answered. The next day, a restraining order was issued against Peterson. On December 24, Regina received a call from jail, which she did not answer. The call made her feel "hopeless" because she did not believe that Peterson was "going to stop."

Regina testified that she had taken certain steps to protect herself from Peterson: "I bought a gun. I've put surveillance cameras all over where I'm living. My salon. I live a very private life. I don't have social media. I don't go to San Francisco. It's changed my relationship with my clients, my friends, my family, on who I can trust. He has a way of getting his information from people either through charm or threats." She went to the police "just in case if something happens to me."

On November 21, the San Mateo County District Attorney filed an amended information charging Peterson with stalking (§ 646.9, subd. (a)). The information also alleged that Peterson had three prior felony convictions, including the 2008 conviction that led to his federal prison sentence.

On February 1, 2017, a jury found Peterson guilty as charged, and the trial court found the prior conviction allegations true. The trial court sentenced Peterson to a three-year prison term. At sentencing on June 29, he sought custody credits beginning on May 10, 2016, the date the warrant for his arrest issued in this case. He argued that the issuance of that warrant prevented him from completing his federal sentence, which ended on April 7, 2017, in a halfway house and thus restrained his liberty. The prosecution argued that Peterson was not entitled to begin accruing credits against his state sentence until his federal sentence ended on April 7. The trial court ultimately agreed with Peterson, and awarded him custody credits beginning May 10, 2016.

Peterson timely appeals his conviction, and the Attorney General has filed a cross-appeal challenging the trial court's custody credit calculation.

DISCUSSION

Peterson makes three arguments: (1) there was insufficient evidence of the intent element of his stalking conviction; (2) that his counsel was ineffective in several respects, including in failing to move to redact certain racial epithets from Peterson's letters, failing to move for a mistrial after an alternate juror was excused for cause, and failing to renew an objection to the prosecution's domestic violence expert[2]; and (3) the trial court erred in admitting the testimony of the prosecution's experts on (a) domestic violence and (b) the Hell's Angels motorcycle gang. Peterson has also filed a petition for writ of habeas corpus (A154083) based on his ineffective assistance of counsel arguments, which we ordered considered with his direct appeal.

I. *Substantial Evidence Supports Peterson's Stalking Conviction*

Section 646.9, subdivision (a) provides: "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking."

When assessing a claim of insufficient evidence, this court must review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) And doing so, we must " 'view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' " (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

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[2] In his opening brief, Peterson also argues that his trial counsel was ineffective in failing to use a preemptory challenge to excuse Juror N. The Attorney General responds that Juror N was not actually seated on the jury, and on reply Peterson has withdrawn this argument.

Peterson argues that there was insufficient evidence that he had the intent to place Regina or her immediate family in fear for their safety, because his credible threats were directed exclusively to other men with whom she was or might become romantically involved. On reply, Peterson asserts that the "only reasonable inference that the jury could make from this evidence is that appellant intended the threats he directed at actual or hypothetical rivals to make [Regina] love him as passionately as she did before he went to prison." Hardly.

Viewing the record as we must, we conclude that the jury could draw the inference that Peterson had the intent to place Regina in reasonable fear for her safety. As noted, Regina testified that during the brief period of their relationship before Peterson went to prison, he was jealous, controlling, and repeatedly physically abused her. (See *People v. McPheeters* (2013) 218 Cal.App.4th 124, 135 ["Based on their extensive domestic violence history, Kathryn C. was justifiably scared of defendant"].) After Regina ended their relationship in 2010, he went on to contact her repeatedly over a period of some seven years, despite her repeated efforts to stop him and even after her eventual involvement of the police. Peterson repeatedly communicated his intent to hurt or kill any of Regina's boyfriends or potential boyfriends. Although he was in prison, on at least one occasion he learned that she was with another man through members of the Hell's Angels gang, and then demanded to know who she was with. At the time the warrant issued in this case, Peterson's release from prison was upcoming and he appeared to have every intention of reuniting with her, despite her repeated requests that he stop contacting her. The jury could conclude that this course of conduct would have the natural consequence of putting a reasonable person in fear for her safety. In fact, Regina testified that it had exactly that effect, causing her to purchase a gun, install surveillance cameras where she lived, avoid certain people and places, and to worry about a situation in which "something happens to me." The jury could further conclude that this was Peterson's intent.

We addressed a similar issue in *People v. Lopez* (2015) 240 Cal.App.4th 436 (*Lopez*). There, the defendant engaged in a years-long campaign of letters, emails,

packages, and in-person visits to the victim, all with romantic overtones, which campaign ultimately resulted in his conviction for stalking. (*Id*. at pp. 438–445.) Defendant argued on appeal that his stalking conviction could not stand because although he had harassed the victim, there was no evidence that he had communicated a willingness to use violence against her, and there was no evidence that he intended to hurt or scare her. (*Id*. at pp. 449.) We rejected both arguments, in language equally applicable here: "The evidence demonstrates that appellant was obsessed with [the victim] over a period of many years, contacted her repeatedly despite her efforts to stop him directly and through involving the police, and made clear both that he knew where she lived and where she went, and that he would not accept her ending what he perceived to be their relationship. [¶] . . . [¶] Appellant's . . . messages, letters and . . . persistence with which he contacted [the victim] despite being told to stop by her and by the police, reveal an obsession that a reasonable person would understand as threatening." (*Id*. at pp. 452–453.) And we added this: "Appellant maintains that despite his *knowledge*, he had no *intent* to instill fear in [the victim], that he only wanted to reconcile with her. But his persistence in the face of [the victim]'s efforts to avoid him and make him understand the degree of fear he was causing her, including going to the police to stop him, amply supports the inference that he intended the result he caused." (*Id*. at p. 454.)

Peterson attempts to distinguish *Lopez* by arguing that in that case the defendant stated in one communication that he knew the victim was afraid to hear from him, and that he "repeatedly appeared in locations very close to [the victim's] home." (See *Lopez*, *supra*, 240 Cal.App.4th at pp. 452–454.) But these particular facts were not dispositive. We emphasized in *Lopez* that "the question is not whether each individual expression communicated the requisite threat but whether the combination of *all* appellant's communications, expressions and conduct did so." (*Lopez*, *supra*, 240 Cal.App.4th at p. 449 (emphasis added); *id*. at p. 453 ["The absence of overt threats in appellant's communications notwithstanding, the course of conduct in which he engaged constituted a credible threat"].) And neither whether Peterson expressly stated that he knew of Regina's fear nor his physical presence near her or her home are dispositive of what the

jury could permissibly infer about his intent from the entire course of his conduct. For the reasons discussed, we conclude that substantial evidence supports their conclusion that he had the requisite intent to place Regina in reasonable fear for her safety.

II. *Trial Counsel Was Not Ineffective In Failing to Seek Redaction of Racial Epithets from Defendant's Letters or Failing to Move for a Mistrial*

A. *Additional Background*

During Regina's testimony in the prosecution's case-in-chief, a letter from Peterson was introduced into evidence and the following exchange took place:

"Q. Can you read the first page of this letter to the jury?

"A. Regina, communicate, that's what we were working on when that sand nigger kept on with the—this ain't like you Reg, I've never seen you like that before. And asked you to—asked you do I got to have someone get at this dude? And your answer was no, I can handle it. . . .

"Q. Okay. And when you hear this reference to sand nigger, do you know—or who do you believe the Defendant is referencing?

"A. An Arabic guy that I was dating."

Regina testified that "get at this dude" meant "talk to them; have them beat up."

After this testimony and a break in the proceedings, the trial court stated that a juror had "indicated [to the bailiff] that since she's heard the opening statements and some of the testimony she cannot be fair." The juror in question, an alternate, was brought into the courtroom and told the court and the attorneys that she found it "really difficult hearing some of the racist things," and did not think she could be fair in assessing the case. She went on to explain that she found the racial epithet particularly offensive because she was married to an Arabic man, and over their 10-year relationship, they had "been through many episodes of racism together." The epithet had also affected her because she was "super emotional and pregnant, five months." After questions from the court and the attorneys, the juror was ultimately excused for cause.

The Arabic man was again referenced briefly later on, when Regina testified regarding a text message from Peterson:

"Q. Back on page 128, do you see this reference again to the sand nigger?

"A. Yes.

"Q. And the statement: I don't care who you date, that sand nigger ruined his life and his family's life. That is not SFPD.

"What is this in reference, again, to here?

"A. He didn't believe that I would be dating a cop. So he went back to the guy that he thought that I was dating a long time ago."

B. *Analysis*

Peterson makes two ineffective assistance of counsel arguments arising out of the above events: that his counsel was ineffective (1) in failing to "sanitize" the phrase "sand nigger" from the letter and text message, and (2) in failing to move for a mistrial after the alternate juror was excused for cause. In a declaration attached to Peterson's habeas petition, trial counsel states that she had "no strategic purpose" for failing to request such redaction, or for not seeking a mistrial.

The burden of proving a claim of ineffective assistance of counsel is on the defendant. (*People v. Cox* (1991) 53 Cal.3d 618, 655.) To demonstrate ineffectiveness, the defendant must show that: (1) counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *In re Jones* (1996) 13 Cal.4th 552, 561.)

1. *Failure to Move to Redact Racial Epithets*

Assuming without deciding that defense counsel should have moved to redact the racial epithets and would have been successful, we do not find any reasonable probability of a different result and thus no prejudice. The epithet was but a tiny portion, in two items, of the voluminous evidence of Peterson's communications with Regina, including some 500 text messages, 19 letters, and numerous phone calls over a period of several

years. And other than clarifying to whom the epithet referred, the prosecution did not call further attention to or otherwise make use of it.

People v. Quartermain (1997) 16 Cal.4th 600 (*Quartermain*) is instructive. There, the trial court denied a murder defendant's motion to exclude certain racial epithets he had used to refer to the victim during his interviews with police. (*Id*. at p. 627.) The Supreme Court held that the denial was not an abuse of discretion, because "like any other expression of enmity by an accused murderer towards the victim," it was relevant to the defendant's prior attitude toward the victim, and thus to the issues of motive as well as premeditation and deliberation. (*Id*. at p. 628.) The Supreme Court also noted that the "unfortunate reality is that odious, racist language continues to be used by some persons at all levels of our society. While offensive, the use of such language by a defendant is regrettably not so unusual as to inevitably bias the jury against the defendant." (*Ibid*.) Because the epithets were "a small portion of the evidence concerning defendant's interviews with the police," and the prosecution did not otherwise focus attention on them, the Supreme Court held the prejudice did not outweigh the probative value and the trial court did not err in refusing to exclude the epithets under Evidence Code section 352. (*Ibid*.)

In sum, and under *Quartermain*, even if the trial court had excluded the epithet, we find no reasonable probability of a different result.

2. *Failure to Move for a Mistrial after Alternate Juror Excused*

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.) Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. (*Illinois v. Somerville* (1973) 410 U.S. 458, 461–462.) Accordingly, it would be a rare case in which the merits of a mistrial motion were so clear that counsel's failure to make the motion would amount to ineffective assistance. Nonetheless, defendant could conceivably prove incompetence if his counsel's omission was shown to be grounded in ignorance or misapplication of the law rather than tactical considerations

(*People v. Jenkins* (1975) 13 Cal.3d 749, 754; *People v. Floyd* (1970) 1 Cal.3d 694, 709) and if the motion for mistrial bore strong potential for success." (*People v. Haskett* (1982) 30 Cal.3d 841, 854–855.)

We find no reasonable probability of a different result had defense counsel moved for a mistrial, because such a motion did not bear strong potential for success. As the alternate juror explained, she found the epithet particularly offensive for personal reasons, i.e., her marriage to an Arabic man, the fact that they had "been through many episodes of racism together," and her being "super emotional and pregnant, five months." In other words, her reaction was personal to her. But her personal reaction to the epithet does not demonstrate that the balance of the jury had been incurably prejudiced, and the general rule of *Quartermain* applies, that the "use of [offensive racial] language by a defendant is regrettably not so unusual as to inevitably bias the jury against the defendant." (*Quartermain*, *supra*, 16 Cal.4th at p. 628.) In addition, as noted, the racial epithet was used briefly, in one letter and one text message, in the context of conduct including hundreds of text messages, 19 letters, and multiple phone calls, all explored over a trial lasting 6 days. The prosecution did not make any use of the offensive nature of the epithet, in closing argument or otherwise. Under the circumstances, we conclude that had defense counsel moved for a mistrial, there is no reasonable probability that the motion would have been granted and a different result obtained.

III. *The Trial Court Did Not Err in Admitting the Testimony of the Prosecution's Gang Expert*

A. *Additional Background*

The prosecution offered Detective Jaime Draper as an expert on the Hell's Angels motorcycle gang, and Peterson moved in limine to exclude Draper's testimony. Before trial, the trial court held a hearing under Evidence Code section 402 to evaluate Draper's qualifications, and ultimately indicated she was inclined to let him testify. Before his testimony, defense counsel again objected to certain aspects of his testimony under Evidence Code section 352, and the trial court overruled those objections.

Draper testified that before becoming an inspector for the San Mateo County District Attorney's office, he was a Daly City police offer for thirteen years, during which time he spent several years as the department's gang officer and as a detective with the San Mateo County Sheriff's Office Gang Intelligence Unit. He had over 600 hours of gang-related training, 20 to 25 percent of which had to do with motorcycle gangs. The majority of his training was conferences, almost all of which had an aspect related specifically to motorcycle gangs, within which the Hell's Angels were a "frequent topic." Draper had been involved in at least three investigations involving members of the Hell's Angels, in addition to numerous surveillance operations involving members of the gang. The trial court qualified Draper as an expert witness in the area of the Hell's Angels motorcycle club and motorcycle clubs in general.

B. *Analysis*

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice." (Evid. Code, § 352.) We review a trial court's decision to admit expert testimony as well as a decision to admit or exclude evidence under Evidence Code section 352 for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222; *People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)

Peterson argues that the trial court abused its discretion in admitting Draper's testimony because its probative value was outweighed by the potential for undue prejudice.[3] He asserts that Draper's testimony had little probative value because Draper's "real expertise was not the Hell's Angels or Bay Riders or motorcycle clubs in general

[3] Peterson also argues that the trial court did not conduct an adequate analysis of probative value and undue prejudice under Evidence Code section 352. But the court heard argument and ruled on whether various specific aspects of Detective Draper's testimony were relevant. In response to defense counsel's argument that his testimony regarding "Hell's Angels being known for stabbing, beating, and things of that nature" would be unduly prejudicial, the trial court found that such prejudice could be cured by cross-examination. We conclude that "the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.)

but Latino or Mexican gangs like the Nortenos," and his knowledge about the Hell's Angels was entirely "secondhand."

Peterson's argument mischaracterizes the record. He relies on Draper's testimony that it was "fair to say" the majority of his experience thus far had been with Latin or Mexican gangs, that he became familiar with how a person gains membership to the Hell's Angels through "talking to other experts in the field, other investigators, and through review of documents that we've seized at the club houses and members' homes over the years," and that he had somewhat limited one-on-one contact with members of the San Francisco chapter of the Hell's Angels. But none of these specific responses mean that Draper in general had no "real expertise" in the Hell's Angles or that all of his knowledge of that subject was "secondhand." The trial court did not err in finding that Draper's testimony had probative value.

With respect to prejudice, Peterson's cases do not support the proposition that gang evidence is inherently prejudicial, but rather that it can be prejudicial where its probative value is minimal. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 ["potentially prejudicial and should not be admitted if its probative value is minimal"]; *People v. Cardenas* (1982) 31 Cal.3d 897, 904 ["The probative value of the gang membership evidence was minimal at best"]; *People v. Cox*, *supra*, 53 Cal.3d at p. 660 ["When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact"]. That is not the situation here, where Peterson admits that his membership in the Hell's Angels was relevant, at a minimum, to help the jury determine whether that membership contributed to causing Regina to reasonably fear for her safety. (See *People v. Hernandez, supra*, 33 Cal.4th at p. 1049 ["Evidence of the defendant's gang affiliation . . . can help prove . . . specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime"].) In sum, the trial court did not abuse its discretion in finding that the probative value of Draper's testimony outweighed any potential for undue prejudice.

IV. *The Trial Court Did Not Err in Admitting the Testimony of the Prosecution's Domestic Violence Expert*

A. *Additional Background*

The prosecution offered Sergeant Linda Gibbons as an expert on the issue of intimate partner battering and its effects. Peterson moved in limine to exclude her testimony, and before trial, the trial court held a hearing under Evidence Code section 402 to evaluate her qualifications. After her testimony, defense counsel agreed that "clearly she would qualify to testify about intimate partner battering." After noting that Gibbons would not be testifying as to the "ultimate issue as to whether or not these letters and texts are credible threats," the trial court found Gibbons qualified as an expert. And at trial, Gibbons testified generally regarding common myths about domestic violence, the cycle of violence that generally takes place in such cases, and how stalking relates to that cycle.

B. *Analysis*

Peterson argues that the trial court erred in admitting Sergeant Gibbons's testimony under Evidence Code section 352. As a threshold matter, Peterson has forfeited this argument by failing to adequately raise it below. The only mention of the argument is in a motion in limine, where Peterson's counsel stated, as part of a lengthy list of other boilerplate objections, that the evidence was "unduly prejudicial and a waste of time in this case ([Evid.] Code, § 352)" and in the supporting memorandum that "even if found marginally relevant, Evidence Code [section] 352 balancing requires exclusion of this irrelevant, yet unduly prejudicial testimony." Peterson's counsel never mentioned any argument based on undue prejudice or Evidence Code section 352 at the section 402 hearing, before Gibbons's testimony, or at any other time, and in fact expressly conceded that "clearly she would qualify to testify about intimate partner battering." Peterson has failed to preserve this objection. [4]

[4] Under these circumstances, we also reject Peterson's argument that the trial court erred in failing to expressly weigh the testimony's probative value against the potential for undue prejudice. (Compare *People v. Green* (1980) 27 Cal.3d 1, 24–26 [error where

However, because Peterson argues in his habeas petition that if this argument was forfeited his trial counsel was ineffective in failing to preserve it, we will address the merits.

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice." (Evid. Code, § 352.) We review a trial court's decision to admit expert testimony as well as a decision to admit or exclude evidence under Evidence Code section 352 for abuse of discretion. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1222; *People v. Minifie*, *supra*, 13.Cal.4th at p. 1070.)

Peterson argues that the trial court abused its discretion because Gibbons's testimony had no probative value and was unduly prejudicial. We disagree. The essence of Peterson's argument is that "the circumstances of domestic violence are absent" because Peterson and Regina never lived together and there were no allegations of physical violence. But Gibbons testified at the Evidence Code section 402 hearing that the same cycle of violence and "characteristics and dynamics" of an intimate partner battering case can apply to stalking. She testified similarly at trial that the act of stalking could fall under the umbrella of intimate partner battering and could fit into the tension building phase of the cycle of violence. Her testimony was thus relevant to Regina and Peterson's relationship, notwithstanding the fact that for most of the period in question there was no possibility of physical violence. (See *People v. Brown* (2004) 33 Cal.4th 892, 907.) Gibbons also testified that the belief that a victim can leave an abusive relationship is a myth, that not every incident of domestic violence or abuse is reported to the police, that victims often hide the abuse from their friends and family, and that it is not uncommon for victims to ask a sentencing judge for leniency for their abuser. (*Id.* at pp. 906–908 [expert evidence regarding domestic violence can be relevant to the credibility of the victim].) This testimony was relevant, for example, to rebut the suggestion by defense counsel during Regina's cross-examination that a letter she had

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trial court failed to expressly weigh probative value against potential for undue prejudice where defendant's counsel "argu[ed] the point at some length"].)

written to the sentencing judge in the federal case undermined her credibility. In short, Gibbons's testimony had probative value and was not irrelevant.

Nor does Peterson allege any undue prejudice arising from the admission of her testimony. He argues that the testimony gave the jury a "conceptual framework that did not fit the facts of the case," but this is merely a rephrasing of the relevance argument we have just rejected. He also asserts that the terms " 'victim' " and " 'batterer' " were "inflammatory." But Gibbons never referred to Peterson as a "batterer." She made clear that she was testifying generally regarding domestic violence, had not reviewed any of the facts of this particular case, and did not "even know [the] names" of the victim or the defendant. The probative value was not outweighed by danger of undue prejudice, and defense counsel's failure to preserve this objection was not ineffective assistance. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1080 ["Counsel's failure to make a meritless objection does not constitute deficient performance"].)

V. *The Trial Court Erred in Calculating Peterson's Custody Credits*

A. *Additional Background*

As noted, Peterson committed the instant offense while he was serving a federal prison sentence set to end on April 6, 2017. A warrant was issued in connection with this case on or about May 10, 2016. At that time, Peterson was in the process of being placed into a residential reentry center to serve the balance of his federal sentence.

At Peterson's sentencing on June 29, 2017, he argued that he was entitled to presentence credits from the date the warrant issued because that warrant caused him a deprivation of liberty. In particular, Peterson attached documentation to his supplemental sentencing memorandum indicating that he would have been eligible for release to a residential reentry center in April 2016. At the hearing, defense counsel further stated that Peterson would have also been eligible for electronic house arrest or home monitoring in October 2016. The prosecution argued that Peterson was entitled to presentence credits accrued only after his federal sentence officially ended on April 6, 2017. After hearing argument, the trial court agreed with Peterson, and awarded him 421 days of presentence credit calculated from May 10, 2016:

"With respect to credits, I'm in agreement with the defense. I believe that credits should be awarded from the time that the Defendant was put in custody here. And here's the reason why and I know it's a complicated issue. It's—the cases are—there is no case on point that addresses this. But what it comes down to is that the *Rojas* case [*In re Rojas* (1979) 23 Cal.3d 152 (*Rojas*)], which is the Supreme Court case the court is going to follow, states that 2900.5 does not authorize credit where the pending proceeding has no effect whatsoever on the Defendant's liberty.

"In this particular case, I think it's clear that from the paperwork submitted by the defense that upon being aware that this county had a pending—probably had a pending case against the Defendant relating to his actions with respect to a prior girlfriend, I believe they stopped processing his paperwork for release to the . . . RCC. [¶] And I think in the best of all worlds, looking at that, it's speculative as to whether or not he would have been released in May, in June, July, or even as early as April. But I do believe that we have to say that knowing about this case did have an effect on his liberty in the other case.

"And so *Rojas*—the language *Rojas* uses is you are not to give credit where the pending proceeding has no effect whatsoever on the Defendant's liberty.

"And here I have to say that the San Mateo County case, I believe, did have an effect on how the federal authorities at the Bureau of Prisons processed Mr. Peterson's release to a halfway house. I believe they stopped processing it because he was—shortly thereafter a detainer was lodged and he was put here into state custody. And resources—there was no real need for them to process him because he was going to be detained here.

"Clearly by October, according to the paperwork, he was eligible and would have been released most likely to a halfway house. Again, it's speculative, but because there is no evidence in the record that they would have halted his release earlier for any other reason, they knew he had—was in the SHU unit, they knew of all the conduct that [the prosecution] provided to the Court, some of which was troubling.

"The federal authorities knew all that, yet they still were going to process him, it sounded like, to allow him released to a halfway house and later to electronic monitoring. That would be consistent with the way the justice system is working now, where defendants are not actually held to the day—the last day of their sentence, they are given some time to re-enter the community.

"With respect to [the prosecution]'s position that the Federal Bureau of Prisons counts halfway house time and electronic monitoring time as custody time. That is the same—exactly the same way as we do it here in the state system. Which is we give credits to the benefit of the defendant. So, for example, if I order a defendant pretrial into a residential treatment program, when it comes time for sentencing, I have to give him that credit because I have asked him to be there. And so the credits run to his benefit, even though he was somewhat more out of custody than if he was in the county jail.

"So I believe the credits would appropriately run from the time that the detainer was placed on the Defendant. . . . [¶] But in this particular case, I think it's also justified because I do have some evidence—or I have evidence, sufficient evidence to show that the Defendant was being processed to be released to a less restrictive setting. And, therefore, our detainer on him that was lodged on May 10th of 2016, caused that—caused him to go into custody here when it's—when he may have been able to be released to a less restrictive setting in the federal system on or before that time."

B. *Analysis*

Since the facts regarding Peterson's custody credits are undisputed, his claim presents solely a question of law which we review de novo. (See *People v. Ravaux* (2006) 142 Cal.App.4th 914, 919; *People v. Anaya* (2007) 158 Cal.App.4th 608, 611.)

Section 2900.5 provides: "(a) In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant . . . shall be credited upon his or her term of

imprisonment . . . . [¶] (b) For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted."

The trial court relied on language from *Rojas*, *supra*, 23 Cal.3d 152. There, the defendant was serving a state prison term on a manslaughter charge when he was transferred to county jail to await trial on an unrelated murder charge. (*Id*. at pp. 154–155.) He spent 207 days in the county jail until he was convicted and sentenced on the murder charge, which time was credited to his term on the manslaughter charge. (*Ibid*.) The Supreme Court denied defendant's habeas petition and held that he was not entitled to credit for those 207 days toward his sentence on the murder charge under section 2900.5: "There is no reason in law or logic to extend the protection intended to be afforded one merely *charged* with a crime to one already incarcerated and serving his sentence for a first offense who is then charged with a *second* crime. As to the latter individual the deprivation of liberty for which he seeks credit cannot be attributed to the second offense. Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty." (*Id*. at p. 156.)

Peterson also relies on *In re Joyner* (1989) 48 Cal.3d 487 (*Joyner*). In *Joyner*, the defendant was arrested in Florida on burglary and grand theft charges. That same day, Florida authorities discovered that he had outstanding California arrest warrants and placed a "hold" on him at California's request. (*Id*. at pp. 489–490.) The defendant pleaded guilty in Florida and began serving a prison sentence there. (*Id*. at p. 490.) He was then extradited to California, where he pleaded guilty to further charges of robbery and grand theft and was sentenced to a four-year term to run concurrently to his Florida sentence. (*Ibid*.) He sought credits for the period from his arrest in Florida until his California sentencing. (*Id*. at p. 492.) The Supreme Court concluded that credits were not available for the period between his Florida sentencing and his California sentencing under *Rojas*, and then went on: "The period from petitioner's arrest in Florida to his sentencing in that state presents a slightly different issue. In determining the proceedings to which this period may properly be attributed, it is significant that the period has been

credited against petitioner's Florida sentences, making it also a period during which petitioner in effect was serving a sentence on another conviction. While petitioner's custody during this time may not have been unavoidable, the record contains no evidence that petitioner ever posted bail on the Florida charges or that he could have obtained release had the California hold not been placed against him. It has not been shown, in short, that the California hold, the precise nature and terms of which are not disclosed by the record [citation], had any effect upon petitioner's liberty at any time. Thus petitioner has failed to demonstrate that his presentence custody was, within the meaning of section 2900.5, 'attributable to' anything other than the Florida proceedings. Accordingly, the logic of *Rojas, supra,* . . . dictates that petitioner's claim to presentence credit be rejected in its entirety on the present record." (*Joyner*, *supra*, 48 Cal.3d at p. 492.)

Peterson turns the holdings of *Rojas* and *Joyner* around, arguing that "[i]f no credit is due where liberty is unaffected, it follows logically that the statute authorizes credit where the pending proceeding *does* affect a defendant's liberty." This may be true in the context of pretrial custody related to a single offense, but it does not support the result Peterson seeks here. By the plain terms of the statute, whether Peterson was in jail or in a residential reentry center, he was in "custody," and that custody was attributable to the unrelated federal charges.[5] Under *Rojas*, Peterson was "already incarcerated and serving his sentence for a first offense [and] then charged with a *second* crime," and the "deprivation of liberty for which he seeks credit cannot be attributed to the second offense." (*Id*. at p. 156.) Similarly under the reasoning of *Joyner*, "in determining the

[5] The parties dispute whether Peterson was to be transferred to a residential reentry center to serve "a portion of the final months of that term (not to exceed 12 months)" under 18 U.S.C. section 3624(c)(1), or as a condition of "supervised release after imprisonment" pursuant to 18 U.S.C. section 3624(e), and Peterson cites authority that the latter situation is not considered "custody" for purposes of a federal statute punishing anyone who "escapes . . . from the custody of the Attorney General." (18 U.S.C. § 751(a); see *United States v. Burke* (9th Cir. 2012) 694 F.3d 1062, 1064.) We need not address this issue, because the controlling statute here is section 2900.5, which expressly includes a "halfway house, rehabilitation facility . . . or similar residential institution" in its definition of custody.

proceedings to which this period [after May 10, 2016] may properly be attributed, it is significant that the period has been credited against [Peterson]'s [federal] sentence[], making it also a period during which [he] in effect was serving a sentence on another conviction." (*Id*. at p. 492.) Most importantly, granting Peterson custody credits for this period would create an impermissible windfall by enabling him to credit that same time period to both his state and federal sentences.

People v. Bruner (1995) 9 Cal.4th 1178 (*Bruner*) is persuasive. In *Bruner*, the defendant was on parole and was arrested for several parole violations, including cocaine use based on a positive urine test. (*Id*. at p. 1181.) Cocaine was found on his person during a search incident to his arrest, and he subsequently pled guilty to cocaine possession and was sentenced to a 16-month prison term. (*Ibid*.) Our Supreme Court held that the trial court properly denied his request for custody credit for the period between his arrest on the revocation matter and his sentencing: "Section 2900.5 is not intended to bestow the windfall of duplicative credits against all terms or sentences that are separately imposed in multiple proceedings." (*Id.* at p. 1191.) "In sum, we hold, consistent with *Rojas* and *Joyner*, that where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint. Accordingly, when one seeks credit upon a criminal sentence for presentence time already served and credited on a parole or probation revocation term, he cannot prevail simply by demonstrating that the misconduct which led to his conviction and sentence was 'a' basis for the revocation matter as well." (*Id*. at pp. 1193–1194.)

So too here. The warrant in this case was not a "but for" cause of Peterson's custody from May 10, 2016 until April 7, 2017. Whether he was in jail or a residential reentry center, he was in "custody" within the meaning of the statute and that custody was credited toward his federal sentence. Awarding him custody credits for that same time period would "bestow [a] windfall of duplicative credits against . . . terms or sentences that [were] separately imposed in multiple proceedings." (*Id*. at p. 1191.)

People v. Mercurio (1985) 169 Cal.App.3d 1108 (*Mercurio*) is also instructive. The defendant there was serving the end of a prison sentence for burglary in a halfway house and participating in a work furlough program when she was arrested for and pled guilty to petty theft. (*Id*. at p. 1109.) At sentencing, she argued that she was entitled to custody credit under section 2900.5 from the time she was arrested on the petty theft charge because her time at the halfway house was not "custody" pursuant to section 2900.5, and thus the second offense caused her to suffer a "substantial loss of freedom by being removed from a work furlough setting at the [halfway] house to one of total incarceration." (*Id*. at p. 1112.) The court rejected her argument: "Her assertion she was not 'in custody' within the meaning of section 2900.5 is meritless. It runs contrary to the express language of subdivision (a) which affords credit against a sentence for time spent in a 'work furlough facility' or a '[halfway] house.' . . . [E]ven if we acknowledge that 'in custody' constitutes an 'elastic' term connoting a concept quite different from incarceration or imprisonment and including restraints not shared by the public generally [citations], we nevertheless conclude Mercurio was 'in custody' within the meaning of the statute. Although she was in work furlough status, she was still an inmate in the custody of the Department of Corrections (see § 6263, subd. (c)) within a confinement context (see § 4504). This is so even though, upon being assigned to a work furlough status, she was granted certain privileges including working outside an institutional setting." (*Id*. at p. 1112.) Likewise here. Whether in a halfway house or on electronic monitoring, Peterson was "in custody" within the meaning of 2900.5, and the but for causes of that custody were Peterson's federal charges and sentence.

Peterson argues that *Mercurio* is distinguishable because it involved state charges, and also that it is wrongly decided. But Peterson offers no reason why federal custody should be treated differently than state custody under these circumstances. For the reasons discussed above, we conclude that *Mercurio* is consistent with *Rojas* and *Joyner*, and that the trial court awarded Peterson an improper windfall of custody credits by calculating those credits from May 10, 2016 instead of the end of his federal sentence on April 7, 2017.

DISPOSITION

By separate order of today's date, Peterson's petition for writ of habeas corpus (A154083) is denied. The case is remanded to the trial court to recalculate Peterson's custody credits from the end of his federal sentence on April 7, 2017, consistent with the views expressed in this opinion. In all other respects, the judgment is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P. J.

_____
Stewart, J.

People v. Peterson (A151953)